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No. 06-694

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 2252A(a)(3)(B) of Title 18 (Supp. IV 2004) prohibits "knowingly * * * advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" contains child pornography.

The question presented is whether Section 2252A(a)(3)(B) is overly broad and impermissibly vague, and thus facially unconstitutional.

PARTIES TO THE PROCEEDING

Parties to the proceedings are those listed in the caption of this case.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Michael Williams, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the court of appeals is set forth in Petitioner's Brief (Pet. App. A) and is reported at 444 F.3d 1286. The opinion and order of the district court is also set forth in Petitioner's Brief (Pet. App. B) (Pet. App., *infra*, 46a-69a) and is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2006. A petition for rehearing was denied on July 17, 2006 (Pet. App., *infra*, 70a-71a). On October 6, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 14, 2006, and on November 6, 2006, he further extended the time to and including December 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law * * * abridging the freedom of speech."

2. The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law."

3. Section 2252A of Title 18 of the United States Code provides in part:

(a) Any person who – * * * *

(3) knowingly – * * * *

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains –

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct; * * * shall be punished [by fine and imprisonment]. 18 U.S.C. §2252A(a)(3)(B) (2000 & Supp. IV 2004).

STATEMENT OF THE CASE

The Respondent, Michael Williams, was the defendant in the district court and will be referred to as "Mr. Williams." The Petitioner, United States of America, will be referred to as "the government."

Mr. Williams is incarcerated in the Federal Bureau of Prisons. On May 13, 2004, Mr. Williams was charged in a two-count indictment with promoting and distributing child pornography in violation of Title 18 U.S.C. §2252A(a)(3)(B) and (b)(1) (Count I) and with possession of child pornography in violation of Title 18 U.S.C. §2256(8)(A) and (B) (Count II). (R1:7).

On July 14, 2004, Mr. Williams filed a motion to dismiss Count I of the indictment on the grounds that the applicable statute was vague and overly broad. (R1:37). That motion was orally denied by the district court on July 19, 2004. A written order was subsequently filed on August 20, 2004. (R1:49).

On July 19, 2004, pursuant to a written plea agreement, Mr. Williams pled guilty to Counts I and II of the indictment. (R1:43). Mr. Williams, however, specifically preserved his right to appeal the order denying his motion to dismiss Count I of the indictment.

On September 22, 2004, the district court sentenced Mr. Williams to sixty (60) months of imprisonment as to Counts I and II, to run concurrently, followed by a term of supervised release for two (2) years and a $200.00 special assessment fee.

Factual Background

On April 26, 2004, SA Devine was signed onto YIRC on a computer located at the United States Secret Service ("USSS") Miami Field Office, Miami, Florida, using the undercover screen name "Lisa_n_Miami" ("LNM"). SA Devine entered a child exploitation chat room entitled "per ten's action uncensored: 1" and observed a public message

from the user "Twatjuicesucker2004" (T4) stating, "Dad of toddler has 'good' pic's of her and me for swap for your toddlers pics, or live cam." PSI at ¶ 6. SA Devine contacted T4 via private message and identified himself as a 30-year-old female mother of a ten-year-old daughter. T4 stated his daughter was two years old and asked LNM to swap photographs of their daughters. T4 stated he had five photographs of his daughter. He also stated he permitted his friends for the "the internet" to travel to Key Largo and engage in sexual activity with his daughter, "for a small price: like a case of Icehouse beer or something." T4 stated that LNM could engage in sexual activity with his daughter if LNM would bring her daughter for him to look at. In addition, T4 told LNM he engaged in sexual activity with an 11-month-old child and he had nude photographs of his daughter "in folder on puter." PSI at ¶6.

Utilizing the YIRC file transfer system, T4 sent photographs to LNM. This file contained a photograph displaying the body of a two to three-year-old white child lying on a couch wearing a bathing suit. Using the YIRC file transfer system, LNM sent T4 an age regression photograph of a ten to twelve-year-old female. T4 stated, "I've got hc pictures of me and dau, and other guys eating her out – do you??" HC allegedly is internet slang for "hard core." PSI at ¶ 7.

On this same date, SA Devine accessed the "Photo Album" section of T4's YIRC profile. This section contained five photographs of a white female child approximately one to two years old in various poses. One of the photographs depicted the child with her breast exposed and her pants down just below her waistline. In addition, one other photograph depicted the same child and another female approximately eight to ten years old. PSI at ¶ 8.

Also on April 26, 2004, SA Devine observed T4 post public messages in the "per ten's action uncensored: 1" chat room accusing LNM of being a police officer and a fake. In response to these postings, SA Devine posted public messages in the "per ten's action uncensored: 1" chat room about T4 being a police officer and a fake. PSI at ¶ 9. SA Devine then observed T4 post the hyperlink http://fl.pgbriefcase.yahoo.com in the "per ten's action uncensored: 1" chat room. SA Devine accessed the Yahoo briefcase via the http://fl.pgbriefcase.yahoo.com hyperlink. This briefcase contained photographs of nude children, approximately five to fifteen years old, displaying their genitals and/or engaged in sexual activity. PSI at ¶ 10.

On April 27, 2004, SA Devine served a subpoena on Yahoo Internet Services for all customer information, including e-mail address and Internet Protocol (IP) report, related to the T4 username. On April 24, 2004, a Yahoo Internet Services representative stated that the T4 username was assigned to e-mail address Twatjuicesucker2004 @Yahoo.com. The Yahoo representative also stated that "Twatjuicesucker2004@Yahoo.com" was accessed from IP addresses 12.77.240.152 on April 25, 2004 at 15:47:49 hours, 12:77.240.16 on April 22, 2004 at 20:06:57 hours, 12.77.238.168 at 19:49:37 hours. SA Devine conducted a "SamSpade.com" online inquiry for the above IP addresses. This inquiry revealed that these IP addresses were assigned to AT&T WorldNet Services. PSI at ¶ 11.

On April 29, 2004, the U.S. Attorney's Office served a subpoena on AT&T WorldNet Services for all customer and billing information, including Automatic Numeric Identification (ANI) information for the above mentioned IP addresses. On the this same date, AT&T WorldNet Services Investigation Department stated that the above IP

addresses were assigned to Michael Williams, 34 Avenue A, Key Largo, Florida. AT&T WorldNet Services also indicated that the Williams' AT&T e-mail address was "Miamimike50@WorldNet.AT&T.net" and Visa account number 4313 0340 9638 6312 was billed for Williams' Internet service. In addition, AT&T WorldNet Services stated the ANI for these IP addresses was (305) 451-3216. PSI at ¶ 12. Inquiries conducted through an online Autotrack and the Florida Department of Highway Safety and Motor Vehicles revealed an address of 34 Avenue A, Key Largo, Florida, and Florida driver's license number W452-554-48-381-0. In addition, SA Devine conducted an online "Primeris Phone Finder" inquiry for telephone number (305) 451-3216. This inquiry revealed the above telephone number was assigned to the Key Largo switch or network of BellSouth Telecommunications. PSI at ¶ 13.

On or about April 29, 2004 Special Agents of the Miami Electronic Crimes Task Force ("MECTF") sought and obtained a federal search warrant for 34 Avenue A, Key Largo, Florida and any computers located therein. Said property and items belonged to Mr. Williams. They executed the search warrant on April 30, 2004. Inside the trailer, agents found two computers containing a total of three hard drives. On the computers examined, agents allegedly found approximately 20-25 images depicting children under the age of 18 engaged in various sexual activity. On April 30, 2004, Mr. Williams was arrested and taken into custody. PSI at ¶ 12-13.

REASONS FOR DENYING THE PETITION

The Eleventh Circuit Court of Appeals correctly determined that Section 2252A(a)(3)(B) of the Prosecutorial Remedies and Other Tools to End the Exploitation of the Children Today Act of 2003 (Protect Act) was unconstitutionally vague and overbroad on its face. The Eleventh Circuit carefully and thoroughly reviewed the long history of pornography and child pornography laws and statutes as well as the policies on which those laws and statutes were based.

After a comprehensive analysis, the Eleventh Circuit correctly determined that Section 2252A(a)(3)(B) is unconstitutionally vague and overbroad.

A. THE ELEVENTH CIRCUIT COURT OF APPEAL'S OPINION DOES NOT WARRANT REVIEW BY THIS COURT

The Eleventh Circuit correctly recognized and concluded that Congress's attempt to remedy the provisions of the Child Pornography Prevention Act (CPPA) that were earlier held unconstitutional by this Court fell short of the mark. Although Congress intended to ban the "offer to transact" (or pandering) in proscribable child pornography, Section 2252A(a)(3)(B) did much more in the way of criminalizing protected speech making it virtually impossible to discern what conduct is protected and what conduct is prohibited. The opinion of the Eleventh Circuit properly invalidated Section 2252A(a)(3)(B) and that opinion does not warrant review by this Court.

B. THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY FOUND THAT SECTION 2252A(a)(3)(B) WAS UNCONSTITUTIONAL AND OVERBROAD

18 U.S.C. §2252A(a)(3)(B) provides, in pertinent part, that anyone who knowingly "advertises, promotes, presents, distributes, or solicits * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" contains illegal child pornography (*i.e.*, "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct") commits a criminal offense. 18 U.S.C. §2252A(a)(3)(B) (Supp. IV 2004). Congress passed Section §2252A(a)(3)(B) in the wake of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

The Eleventh Circuit recognized that subsections (i) and (ii) of Section 2252A(a)(3)(B) "capture perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same." Pet. App., *infra*, 19a. The Eleventh Circuit further acknowledged that "[t]he materials touted by [respondent] in this case were clearly illegal child pornography." See *id.* at 21a n.54; *id.* at 18a. The Eleventh Circuit also rejected the government's argument that because Mr. Williams' written plea agreement referred only to a right to challenge his conviction on overbreadth grounds, the agreement did not preserve a right to challenge the conviction on vagueness grounds. Pet. App., *infra*, 37a-38a.

The Eleventh Circuit noted that Congress "remedie[d] the problem" identified by *Free Speech Coalition* of "penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography." Pet. App., *infra*, 16a. Congress accomplished this by moving the pandering provision "from the definitions section to a stand-alone status, and using language that targets only the act of pandering." *Ibid.* The Eleventh Circuit also noted that Congress "beef[ed] up its findings" on the increased prosecutorial difficulties caused by the "ready availability" of technology that can make pictures of real children unidentifiable or appear to be computer-generated. *Id.* at 17a.

The Eleventh Circuit correctly held that Section 2252A(a)(3)(B) was facially unconstitutional on overbreadth and vagueness grounds. Pet. App., *infra*, 37a, 42a, 45a, 41b. In addressing Mr. Williams' overbreadth challenge, the Eleventh Circuit noted that Section 2252A(a)(3)(B) would likely pass constitutional muster "[i]f all that the pandering provision stood for was that individuals may not commercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were." App., *infra*, 21a. This was so, the Eleventh Circuit concluded, because "the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product." *Ibid.* Because in the Eleventh Circuit's view, however, Section 2252A(a)(3)(B) is "not limited to commercial exploitation" but encompasses non-commercial speech as well, the Eleventh Circuit went on to consider whether "the restriction on such non-commercial speech is constitutionally overbroad." *Id.* at 22a. In so doing, the Eleventh Circuit

reasoned that Section 2252A(a)(3)(B) was "problematic" for three reasons. Pet. App., *infra*, 22a.

First, because the "pandered child pornography need only be 'purported'" to be covered by the statute, the Eleventh Circuit was concerned that the statute sweeps in material that either does not in fact exist or that does not satisfy the legal definition of child pornography. *Ibid.* Second, the provision bans protected speech in the form of "the description or advocacy of illegal acts" in circumstances that do not rise to the level of "immediate incitement." *Id.* at 23a & n.58. Third, the Eleventh Circuit found "particularly objectionable the criminalization of speech that 'reflects the belief' that materials" are illegal child pornography because, in the court's view, the provision punishes "a defendant's beliefs that simulated depictions of children are real or that innocent depictions of children are salacious." *Id.* at 23a. The Eleventh Circuit stated that under Section 2252A(a)(3)(B), the intent to traffic in illegal pornography "only applies to one portion of the provision – promoting material in a manner 'that is intended to cause another to believe' it is illicit." *Id.* at 36a.

Accordingly, the Eleventh Circuit concluded that Section 2252A(a)(3)(B) "abridges the freedom to engage in a substantial amount of lawful speech in relation to its legitimate sweep," and held that it was unconstitutionally overbroad. Pet. App., *infra*, 35a-36a.c. With respect to Mr. Williams's vagueness argument, the Eleventh Circuit was concerned that, because Section 2252A(a)(3)(B) requires neither that the pandered material depict real children nor "that any 'purported' material * * * actually exist," and because the court read the "reflects the belief" portion of the statute as having "no intent requirement," the government could establish a violation of the provision with

proof of any communication deemed "reflective of perverse thought." Pet. App., *infra*, 40a. The Eleventh Circuit further concluded that "the determination of what constitutes presentation in a 'manner that is intended to cause another to believe' that material contains illegal child pornography," was even more complex. *Id.* at 39a. In the Eleventh Circuit's view, the provision would capture an email entitled "Good pics of kids in bed" sent by a grandparent, with innocent pictures attached of grandchildren in pajamas. *Id.* at 40a-41a.

SUMMARY OF THE ARGUMENT

Title 18 U.S.C. §2252A(a)(3)(B) is unconstitutionally vague and overbroad on it's face because it criminalizes conduct and material based upon what another person "may believe" contains is child pornography, even if the conduct or material really does not, in fact, involve child pornography. By criminalizing conduct that may not involve child pornography and by making that conduct criminal based upon what someone *may* "believe" the material contains child pornography, the statute violates the First Amendment to the United States Constitution.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. AS THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH AND SUPPORTED BY THIS COURT'S PRECEDENCE ON THE ISSUE OF THE VOID FOR VAGUENESS DOCTRINE, NO REVIEW IS NECESSARY

The Eleventh Circuit was correct when it held that 18 U.S.C. §2252A(a)(3)(B) was unconstitutionally vague and overbroad on its face. Section 2252A(a)(3)(B) improperly criminalizes conduct dependent upon beliefs, appearances and impressions, rather than facts. Constitutional free speech demands bright line rules, not gray areas which abound in Title 18 U.S.C. §2252A(a)(3)(B) and which subjects a person to criminal penalties if the person knowingly:

"(B) advertises, promotes, presents, distributes or solicits through the mails, or in interstate of foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains . . .

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct."

This statute contains several infirmities. **One**, it does not reasonably provide notice as to *what is* criminalized. **Two**, it is unconstitutionally vague. **Three**, it is unconstitutionally overbroad. The Supreme Court recognizes the validity of facial attacks on overbroad statutes affecting

constitutional rights, one of those being free speech. *Virginia v. Hicks*, 593 U.S. 113 (2003), citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The Overbreath Doctrine prohibits the government from banning unprotected free speech if a substantial amount of protected speech is prohibited or chilled. *Ashcroft v. Free Speech Coalition*, 535 U.S. 261 (2002).

The statute in question is commonly called the "pandering" provision of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("The Protect Act"), Pub. L. No. 108-21, 117 Stat. 650. Congress passed the Protect Act in an effort to respond to the United States Supreme Court's decision in *Ashcroft I*. In *Ashcroft I*, the Supreme Court found a similar section of the Child Pornography Prevention Act of 1996 ("CPPA") passed by Congress in 1996, to be unconstitutional. *Ashcroft I*, 535 U.S. at 258. The CPPA was one of Congress' first attempts to proscribe child pornography on the internet. The Protect Act was Congress' second attempt. But like its predecessor statute, this particular pandering provision of the Protect Act also suffers from similar constitutional infirmities.

In *Ashcroft v. The Free Speech Coalition,* 535 U.S. 234 (2002), the legal challenge was to Title 18 U.S.C. §§2256(8)B and 2256(8)D. This Court ruled *both* sections overbroad and unconstitutional.

Title 18 U.S.C. §2256(8)D was found to be overbroad substantially because the determination turned on how the speech was presented not on what was depicted. Title 18 U.S.C. §2256(8)B banned a range of sexually explicit images, sometimes called "virtual" child pornography that appeared to depict minors but were produced by means

other than using real children such as youthful looking adults or computer technology. This Court held that the overbreadth doctrine protected the government from banning unprotected speech if the substantial amount of protected speech prohibited or chilled in the process. Basically, the Court held that there was an insufficient government interest that criminalizing virtual child pornography left unprotected a substantial amount of speech not tied to the government interest in distinguishing images produced using real children from virtual ones.

In *Ashcroft,* this Court held that the words "appears to be" and "conveys the impression" provisions were both overbroad and vague, chilling production of works protected by the First Amendment. The statute at issue in this case, the Protect Act, suffers from the same type of constitutional infirmity. That is, there is no meaningful distinction between the words that this Court found objectionable in *Ashcroft* – "Appears to be" and "conveys the impression" – and the words used in the statute at issue – "reflects the belief or that is intended to cause another to believe." "Reflects the belief" just as vague and overbroad as "appears to be" and "conveys the impression." In short, just as its predecessor statute was unconstitutionally vague and overbroad, so too is the current statute unconstitutionally vague and overbroad and, pursuant to *Ashcroft*, the holding of the Eleventh Circuit Court should be affirmed and the Petition denied.

The best way to demonstrate the constitutional infirmity of the statute at issue is by looking at a practical example. Six (random) people are sitting on a bus bench. John Doe walks by and says to all of them, "I've got some great juicy pictures of hot young babes." The six people are

then separated and individually asked what they think the images contain that John Doe is talking about.

Person 1 says, "Pamela Anderson in her skimpy red bikini on the beach in a scene from Baywatch." **Person 2** says, "the recent paparazzi shots taken under the dress of Britney Spears as she was getting into her Mercedes Benz SLR." **Person 3** says, "I really have no clue." **Person 4** says, "they are probably revealing photos of young girls who might be under age, but then again, maybe not." **Person 5** says, "he's got nude photos of underage girls." **Person 6** says, "I think he has one of those videos from 'Girls Gone Wild', you know, those videos of college girls on spring break promoted by Snoop Dog which are advertised on late night television."

Do we indict and convict John Doe? Of course not. How can we? Ambiguous words which can be subjectively interpreted in many ways, some of which would make John Doe a law violator and others not, cannot become prohibited speech. As despicable as child pornography is, the Eleventh Circuit forcefully recognized that " . . . Congress may not 'burn the house to roast the pig.' "

CONCLUSION

The Eleventh Circuit Court of Appeals ruled correctly. Title 18 U.S.C. §2252A(a)(3)(B) is unconstitutionally vague and overbroad. The Free Speech Clause of out First Amendment cannot mean anything if a person in this country can be arrested, prosecuted, convicted and imprisoned for using a poor choice of words, which, depending on what somebody else interprets same to mean – even if, in reality, what the speaker is actually talking about, is, in fact, totally harmless, or worse yet – non-existent. Mr. Williams respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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